

7  
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

RECEIVED

AUG 29 2003

DEPARTMENT OF ECOLOGY  
OFFICE OF DIRECTOR

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THURSTON COUNTY

ASSOCIATION OF WASHINGTON  
BUSINESS,

Petitioner,

v.

THE POLLUTION CONTROL HEARINGS  
BOARD, and THE STATE OF  
WASHINGTON,

Respondents.

NO. \_\_\_\_\_

PETITION FOR JUDICIAL REVIEW OF  
AGENCY ACTION

COMES NOW the Petitioner herein, pursuant to RCW 34.05.510, *et seq.*, and RCW 43.21B.190, and petitions this Court to review and reverse a decision of the Pollution Control Hearings Board entered on August 4, 2003.

**I. PETITIONER**

1.1 Petitioner Association of Washington Business ("AWB") is an association representing over 3700 businesses in the State of Washington. The mailing address of the AWB is:

Association of Washington Business  
ATTN: Gary Chandler, Vice President Governmental Affairs  
P.O. Box 658  
Olympia, WA 98507-0658

PETITION FOR JUDICIAL REVIEW OF  
AGENCY ACTION - 1

STOEL RIVES LLP  
ATTORNEYS

600 University Street, Suite 3600, Seattle, WA 98101-3197  
Telephone (206) 624-0900

1.2 The attorneys for Petitioner are:

James A. Tupper, Jr. WSBA No. 16873  
Beth S. Ginsberg, WSBA No. 18523  
Laura J. Beveridge, WSBA No. 33324  
Stoel Rives, LLP  
600 University Street, Suite 3600  
Seattle, WA 98101

## II. AGENCY WHOSE ACTION IS AT ISSUE

2.1 The agency whose action is at issue is Respondent Pollution Control Hearings Board ("PCHB" or "Board"). The PCHB is a part of the Washington Environmental Hearings Office and is an agency of the State of Washington. The address of the Pollution Control Hearings Board is:

Pollution Control Hearings Board  
Rowe Six, Bldg. 2, MS 40903  
4224 6th Avenue SE  
Lacey, WA 98504-0903

## III. ACTION APPEALED

3.1 This Petition is filed to obtain judicial review of the PCHB's Findings of Fact, Conclusions of Law, and Order ("Final Order") in PCHB Case Nos. 02-162, 163 and 164. The Final Order was issued by the PCHB and served on all parties on August 4, 2003. A true and correct copy of the Final Order is attached to this Petition as Exhibit A. The Final Order makes final and incorporates an Order Granting Partial Summary Judgment ("Summary Judgment Order") entered by the PCHB on June 6, 2003. A true and correct copy of the Summary Judgment Order is attached to this Petition as Exhibit B. The PCHB action constituted an administrative review of the Industrial Stormwater General Permit ("Permit") issued by the Department of Ecology on August 21, 2002. A true and correct copy of the Permit is attached as Exhibit C.

PETITION FOR JUDICIAL REVIEW OF  
AGENCY ACTION - 2

STOEL RIVES LLP  
ATTORNEYS  
600 University Street, Suite 3600, Seattle, WA 98101-3197  
Telephone (206) 624-0900

1 IV. PARTIES TO THE ADJUDICATION BELOW

2 4.1 The Puget Soundkeeper Alliance, Waste Action Project, Washington Public  
3 Employees for Environmental Responsibility, Resources for Sustainable Communities, Citizens  
4 for a Healthy Bay and Washington Environmental Balance, Inc., ("Puget Soundkeeper  
5 Alliance") were petitioners in PCHB No. 02-162. Richard A. Smith, of Smith & Lowney,  
6 PLLC, represented Puget Soundkeeper Alliance before the PCHB.

7 4.2 The Boeing Company ("Boeing") was a petitioner in PCHB No. 02-163. Peter  
8 E. Hapke, of The Boeing Company Office of General Counsel, represented Boeing before the  
9 PCHB.

10 4.3 Snohomish County was a petitioner in PCHB No. 02-164. Shelly E. Kneip and  
11 Sean Howe, Deputy Prosecuting Attorneys for Snohomish County, represented Snohomish  
12 County before the PCHB.

13 4.4 AWB intervened in a consolidated appeal involving all three cases before the  
14 PCHB.

15 4.5 The State of Washington Department of Ecology ("Ecology" or "the  
16 Department") was a respondent in the quasi-judicial proceeding before the PCHB. The physical  
17 address and mailing address of Ecology headquarters, respectively, are:

18 Department of Ecology  
19 300 Desmond Drive  
Lacey, Washington 98503

20 and

21 Department of Ecology  
22 P.O. Box 47600  
Olympia, Washington 98504-7600.

23 Ecology was represented before the PCHB by Assistant Attorney General Ronald L. Lavigne  
24 and the Office of the Washington State Attorney General.

25  
26 PETITION FOR JUDICIAL REVIEW OF  
AGENCY ACTION – 3

STOEL RIVES LLP  
ATTORNEYS  
600 University Street, Suite 3600, Seattle, WA 98101-3197  
Telephone (206) 624-0900

## V. FACTS

5.1 Stormwater discharges are by their nature intermittent and highly variable in concentration. Consequently, stormwater is not amenable to regulation by the means traditionally applied to continuous industrial discharges under state and federal water quality laws. Ecology, therefore, regulates industrial stormwater discharges by general permit. Under the general permit, compliance is based on the implementation of best management practices ("BMPs") to control and eliminate pollutants in stormwater discharges. In its Summary Judgment Order, the PCHB unlawfully invalidated critical conditions in the Permit at issue in this case, which allowed for standard mixing zones and established compliance schedules to ensure conformance with state water quality standards. In addition, the Board, in its Final Order, unlawfully invalidated the benchmark established by Ecology for copper discharges and imposed additional and unreasonable monitoring requirements on the Permit.

5.2 Ecology is designated as the state water pollution control authority for the purposes of the federal Clean Water Act ("CWA"). 33 U.S.C. § 1251, *et seq.*; RCW 90.48.260. This designation includes the exclusive authority to implement the federally delegated National Pollutant Discharge Elimination System ("NPDES") water quality permitting in the state of Washington. RCW 90.48.260(1).

5.3 Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires that discharges of stormwater associated with certain industrial activities obtain coverage under an NPDES permit. The CWA mandates that industrial stormwater permittees come into compliance with section 402(p) as expeditiously as possible, but no later than three years after the date of issuance of a permit. 33 U.S.C. § 1342(p)(4)(A). Compliance with section 402(p) entails compliance with the requirements set forth in section 402(p) and the effluent limitations imposed under section 301 of the CWA. 33 U.S.C. § 1342(p)(3)(A); 33 U.S.C. § 1311.

1           5.4     Under these provisions of the CWA, stormwater discharges must comply with  
2 applicable effluent limitations imposed by state, as well as federal, law. Washington's water  
3 quality standards decree, for the purposes of stormwater pollution, that the "primary means to  
4 be used for requiring compliance with water quality standards shall be through BMPs." WAC  
5 173-201A-510(3).<sup>1</sup> The Permit implements this state law requirement by compelling each  
6 permittee to develop and implement a Stormwater Pollution Prevention Plan ("SWPPP") which  
7 incorporates the BMPs necessary to comply with water quality standards. Ex. C, Condition S9.  
8 The BMPs selected for a particular site must be consistent with Ecology's Stormwater  
9 Management Manual ("SWMM") or the equivalent of that guidance document. Adopting BMP  
10 guidance from the SWMM is intended to achieve and constitute compliance with water quality  
11 standards for the purposes of Condition S7. Ex. C.

12           5.5     State water quality standards include and allow standard mixing zones to be  
13 applied to stormwater discharges. A mixing zone is expressly authorized where the applicant  
14 demonstrates to Ecology compliance with specific criteria, including a showing that all  
15 appropriate BMPs have been applied to the discharge and the discharge will not result in the  
16 loss of habitat or create a barrier to the migration of aquatic species. WAC 173-201A-400(10).  
17 The Permit incorporates this element of state water quality standards by allowing an applicant to  
18 certify compliance with the criteria. Furthermore, under the Permit, Ecology reserves the right  
19 to deny a standard mixing zone or to revoke a standard mixing zone if the Department later  
20 determines that one or more criteria in the water quality standards does not apply. Ex. C,  
21 Condition S3(E)(4).

22           5.6     The PCHB's Summary Judgment Order invalidates standard mixing zones, and  
23 the permit procedures applicable to obtaining standard mixing zones, on two inherently  
24

---

25           <sup>1</sup> This Petition cites to the revised state water quality standards. While the revised  
26 standards have not been approved by EPA, as required by 33 U.S.C. §1313, the cited provisions,  
although renumbered, were not among those modified by Ecology.

1 improper grounds. First, the PCHB improperly assumes the mantle of Ecology and  
2 inappropriately attempts to prescribe the level of demonstration the Department should require  
3 of applicants seeking approval of a standard mixing zone. Second, the PCHB unlawfully  
4 assumes that permit applicants are in violation of, or likely to violate, the requirements for  
5 adopting and implementing BMPs. The actions of the PCHB are unconstitutional, in excess of  
6 the Board's statutory authority, result from an unlawful procedure and an erroneous application  
7 of the law, are not based on substantial evidence in the record, and are arbitrary and capricious.

8         5.7 In its Final Order, the PCHB also imposed an additional monitoring requirement  
9 for mixing zones approved under the Permit. Specifically, the PCHB remanded the Permit to  
10 Ecology with instructions to establish receiving water monitoring requirements for any  
11 approved mixing zone whenever "stormwater could potentially create a significant  
12 environmental risk" and such instream monitoring is feasible. Ex. A, Order. The monitoring  
13 demanded by the Board is "at the edge of the mixing zone." Ex. A, Finding of Fact XIX. There  
14 is no evidence in the record that such monitoring can be done safely or be accomplished at a  
15 reasonable cost. The record is also silent as to how, under a general permit, Ecology should  
16 determine what constitutes a "significant environmental risk," set specific monitoring conditions  
17 as to timing, flow, and location. The Board's ruling is arbitrary and capricious and exceeds the  
18 PCHB's statutory authority. In addition, the ruling results from an unlawful procedure,  
19 constitutes an erroneous application of the law, and is not based on substantial evidence in the  
20 record.

21         5.8 The Final Order added a second monitoring requirement that permittees sample  
22 the "first fall storm event." This requirement is on its face unreasonable. The Permit  
23 monitoring requirements already require a storm event analysis by establishing the duration,  
24 volume, and timing for rain events to sample. Ex. C, Condition S4. The record and ruling is  
25 devoid of any assessment of the practical limitations on permittees to respond to a specific  
26

1 storm event as opposed to rain events of a particular character occurring over a quarterly  
2 monitoring period. The action of the PCHB is arbitrary and capricious, results from unlawful  
3 procedure, constitutes an erroneous application of the law, and is not based on substantial  
4 evidence in the record.

5 5.9 The Permit imposes numeric effluent limitations on discharges to 303(d) listed  
6 water bodies. Section 303(d) of the CWA, 33 U.S.C. § 1313(d), requires the state to list those  
7 water bodies where implementation of technology based effluent limitations established under  
8 the CWA are not stringent enough to achieve applicable water quality standards. The Permit  
9 includes numeric effluent limitations, based on numeric water quality criteria, for any discharge  
10 to a waterbody segment identified as "impaired" by Ecology pursuant to section 303(d). For  
11 existing discharges not meeting a numeric effluent limitation, the Permit establishes a  
12 compliance schedule that requires the progressive application of BMPs to identify and  
13 implement source control and treatment options necessary to comply with water quality  
14 standards. Ex. C, Condition S3(D)(2).

15 5.10 Compliance schedules are expressly authorized by the state water quality  
16 standards. WAC 173-201A-510(4)(a) allows a compliance schedule for "implementation of  
17 additional storm water BMPs for discharges determined not to meet water quality criteria...."  
18 The state standards allow compliance schedules to cover a time period not exceeding ten years,  
19 but indicate that, in general, compliance schedules should not exceed the term of the permit.  
20 WAC 173-201A-510(4)(c). By its own terms, the compliance schedule in the Permit is no  
21 longer than nine years and does not, in any case, exceed the term of the Permit. The Summary  
22 Judgment Order's invalidation of the compliance schedule condition is unconstitutional,  
23 exceeds the statutory authority of the PCHB, results from an unlawful procedure, constitutes an  
24 erroneous application of the law, is not based on substantial evidence in the record, and is  
25 arbitrary and capricious.

26  
PETITION FOR JUDICIAL REVIEW OF  
AGENCY ACTION – 7

STOEL RIVES LLP  
ATTORNEYS  
600 University Street, Suite 3600, Seattle, WA 98101-3197  
Telephone (206) 624-0900

1           5.11   The Permit requires quarterly monitoring to assure compliance with 303(d)  
2   numeric effluent limitations and to evaluate the effectiveness of BMPs. BMP effectiveness is  
3   measured by benchmarks established by Ecology. Benchmarks are not water quality based  
4   effluent limitations and there is no assumption that exceeding a benchmark will cause or  
5   contribute to a violation of water quality standards. Benchmarks are intended to be a measure  
6   of how well BMPs are working. If monitoring demonstrates that discharges are below the  
7   relevant benchmark, it is an indication that BMPs are effectively protecting water quality.  
8   Conversely, where monitoring shows an exceedance of a benchmark, it is an indication that the  
9   permittee needs to review the BMPs employed and update its SWPPP.

10           5.12   The Permit, except for industries with EPA established effluent limitations,  
11   requires monitoring for four benchmarks: turbidity, pH, total zinc, and petroleum. In the event  
12   monitoring exceeds the benchmark for zinc for two consecutive quarters, the permittee must  
13   begin to monitor for copper, lead, and water hardness.

14           5.13   The validity of the benchmarks was not an issue before the PCHB. In a  
15   prehearing order issued by the Board, the consolidated appeals were limited to specific  
16   enumerated issues. The issues did not include a challenge to the benchmarks. The PCHB  
17   nonetheless evaluated benchmarks as water quality based effluent limitations and issued a ruling  
18   in its Final Order requiring that Ecology establish a lower benchmark for copper in waters  
19   “where stormwater is identified as a limiting factor for salmon recovery” and waters listed as  
20   impaired for copper under section 303(d).

21           5.14   There is no regulatory basis for setting benchmarks based on streams where  
22   stormwater is identified as a limiting factor for salmon recovery. There is also no basis for  
23   establishing a new benchmark for copper in discharges to 303(d) waters listed as limited based  
24   on copper. The Permit already requires compliance with state water quality standards in 303(d)  
25   waters. The copper benchmark does not allow a permittee to exceed that effluent limitation  
26

PETITION FOR JUDICIAL REVIEW OF  
AGENCY ACTION – 8

STOEL RIVES LLP  
ATTORNEYS  
600 University Street, Suite 3600, Seattle, WA 98101-3197  
Telephone (206) 624-0900



1 except as authorized under a compliance schedule. The Final Order's invalidation of the copper  
2 benchmark is arbitrary and capricious, unconstitutional, exceeds the statutory authority of the  
3 PCHB, results from an unlawful procedure, constitutes an erroneous application of the law, and  
4 is not based on substantial evidence in the record.

## 5 VI. ASSIGNMENTS OF ERROR

6 6.1 The PCHB's Summary Judgment Order and Final Order invalidating conditions  
7 of the Permit regarding compliance schedules and mixing zones, the copper benchmark, and  
8 modifying monitoring requirements not only violates state law, but is unsupported by and  
9 contrary to the evidence in the record. The Board's action goes beyond its statutorily conferred  
10 adjudicatory authority and constitutes an unlawful attempt to set public policy. The factual and  
11 legal errors in both the Summary Judgment Order and Final Order include, but are not limited  
12 to, those set forth below.

13 6.2 The PCHB erred in failing to find that the Permit conditions for compliance  
14 schedules, mixing zones, and monitoring are consistent with the applicable requirements of  
15 federal and state law. Substantial evidence in the record establishes that the Permit conditions  
16 are fully protective of waters of the state and lawful. Accordingly, the PCHB's determination is  
17 both unsupported by substantial evidence and arbitrary and capricious.

18 6.3 The PCHB erred in raising, *sua sponte*, the appropriate benchmark to measure  
19 the effectiveness of BMPs to control stormwater discharge of copper. In doing so, the PCHB  
20 denied the parties any notice or opportunity to be heard on the benchmark set by the Board.  
21 Consequently, this action violates the basic due process rights of the AWB, the procedural  
22 requirements of the APA, and the Board's own procedural rules governing appeals.

23 6.4 The PCHB erred in setting its own guidelines for a copper benchmark that is not  
24 supported by substantial evidence in the record. Substantial evidence in the record establishes  
25 that the overly restrictive standard for a copper benchmark imposed by the PCHB is not  
26

1 necessary for the protection of water quality standards. The Board's Final Order is therefore not  
2 supported by substantial evidence and is arbitrary and capricious. In addition, the PCHB acted  
3 in excess of its statutory authority.

4 6.5 The PCHB erred by requiring a benchmark for copper in waters "where  
5 stormwater is identified as a limiting factor for salmon recovery." The action of the PCHB is  
6 unsupported by substantial evidence and is arbitrary and capricious.

7 6.6 The PCHB erred by requiring a benchmark for copper to waters listed under  
8 section 303(d) as impaired for copper where the Permit already imposes an effluent limitation  
9 based on the state water quality standards. It was arbitrary and capricious for the PCHB to  
10 require an additional benchmark. In addition, the PCHB's determination is not supported by  
11 substantial evidence.

12 6.7 The PCHB acted in excess of its statutory authority and, thus, erred by not  
13 deferring or according substantial weight to the technical and scientific expertise of Ecology in  
14 setting permit conditions for compliance schedules, mixing zones and monitoring requirements.

15 6.8 The PCHB erred when it invalidated the compliance schedule conditions in the  
16 Permit where the compliance schedules are expressly authorized by state water quality  
17 standards. The PCHB's actions are not supported by substantial evidence in the record, are  
18 contrary to law, and are arbitrary and capricious.

19 6.9 The PCHB erred in invalidating the mixing zone conditions in the Permit where  
20 mixing zones and standard mixing zones are expressly authorized under state water quality  
21 standards. The PCHB's actions are not supported by substantial evidence in the record, are  
22 contrary to law, and are arbitrary and capricious.

23 6.10 The PCHB erred by considering and finding that purported violations of the  
24 Permit constituted grounds for invalidating Permit conditions for compliance schedules and  
25 mixing zones. The PCHB does not have jurisdiction to initiate enforcement actions and may  
26

1 not lawfully base its decision to invalidate and remand the Permit on its unfounded assumption  
2 that entities covered under the Permit will violate the Permit. Accordingly, the PCHB's actions  
3 are not supported by substantial evidence, in excess of its statutory authority, contrary to law,  
4 and are arbitrary and capricious.

## 5 VII. RELIEF REQUESTED

6 7.1 For the reasons detailed above, Petitioner requests that this Court set aside or  
7 modify the PCHB's August 4, 2003 Final Order and June 6, 2003 Summary Judgment Order as  
8 follows:

9 7.2 Vacate the Summary Judgment Order ruling invalidating and remanding the  
10 compliance schedule for existing facilities in Condition S3(D)(2);

11 7.3 Vacate the Summary Judgment Order ruling invalidating and remanding the  
12 standard mixing zone application and approval procedures in Condition S3(E);

13 7.4 Vacate the Final Order remand of the Permit to require monitoring of "first fall  
14 storm event" in Condition S4;

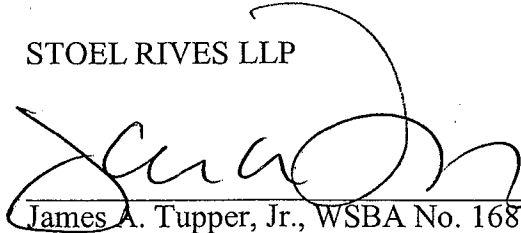
15 7.5 Vacate the Final Order ruling invalidating the Permit benchmark for copper and  
16 remanding of the Permit to develop a new copper benchmark;

17 7.6 Vacate the Final Order ruling requiring monitoring at the edge of a mixing zone;  
18 and

19 7.7 Such other and further relief as the Court deems just and equitable.

20 DATED this 29<sup>th</sup> day of August, 2003.

21 STOEL RIVES LLP

22  
23   
24 James A. Tupper, Jr., WSBA No. 16873  
25 Beth S. Ginsberg, WSBA No. 18523  
26 Laura J. Beveridge, WSBA No. 33324  
Attorneys for the Association of Washington Business

PETITION FOR JUDICIAL REVIEW OF  
AGENCY ACTION - 11

STOEL RIVES LLP  
ATTORNEYS  
600 University Street, Suite 3600, Seattle, WA 98101-3197  
Telephone (206) 624-0900

DECLARATION OF SERVICE

I, Susan M. Barragan, certify under penalty of perjury under the laws of the State of Washington that, on August 29, 2003, I caused the foregoing document to be process served by legal messenger on the parties listed below:

Office of the Director  
Environmental Hearings Office  
4224 6th Avenue SE, Bldg. 2, Rowe Six  
Lacey, WA 98504-0903

Department of Ecology  
300 Desmond Drive  
Lacey, WA 98503

Ronald L. Lavigne  
Office of the State Attorney General  
Attorney General's Office  
Ecology Division  
2425 Bristol Court SW, 2nd Floor  
Olympia, WA 98502

With copies delivered to the following parties via legal messenger as follows:

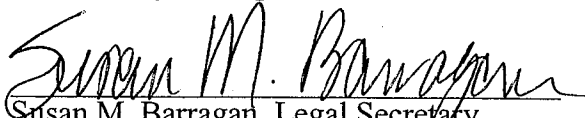
Richard A. Smith  
Smith & Lowney, PLLC  
2317 E. John Street  
Seattle, WA 98112

Sean Howe  
Deputy Prosecuting Attorney  
Snohomish County  
2918 Colby Avenue, #203  
Everett, WA 98201

With copies delivered to the following party via first class mail, postage prepaid, as follows:

Peter E. Hapke  
The Boeing Company  
Office of General Counsel  
M/S 13-08  
P. O. Box 3707  
Seattle, WA 98124

DATED at Seattle, Washington this 29th day of August, 2003.

  
Susan M. Barragan, Legal Secretary

PETITION FOR JUDICIAL REVIEW OF  
AGENCY ACTION - 12

STOEL RIVES LLP  
ATTORNEYS  
600 University Street, Suite 3600, Seattle, WA 98101-3197  
Telephone (206) 624-0900